IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 441.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, American Safety Table Company, prays this Court for a rehearing pursuant to Rule 33, subdivision 2 of this Court. Petitioner has confined itself on this application for rehearing to substantial grounds for the granting of the writ available to it although not previously presented.

Unlike the Universal cases (nos. 439 and 440), the court below made no finding in this case that the original judgment in favor of American had been procured by any improper influence upon any member of that court. Your petitioner therefore earnestly

urges that its present application be considered separate from that made by Universal in number 439 and 440 in order that justice may be done it.

The following substantial grounds for allowance of the writ demonstrate again that your petitioner should not be deprived of its entire cause of action solely because it later developed that the attorney whom it unfortunately employed was in other cases involved in a scandalous relation with one of the judges of the court.

In similar siuations in another court, to which we shall refer, litigants were required to reargue the mandates said to have been affected. No court ever before deprived the litigant under such circumstances of its entire cause of action.

I.

In the petition and briefs submitted on the original application for the writ herein, the court's attention was not called to the precedent established by the Second Circuit in the Manton situation where that Court of Appeals was called upon to deal with private litigation allegedly affected by the corrupt situation existing between certain attorneys and a member of that court. Judge Manton, certain lawyers and certain officers and agents of the litigants had been convicted (*U. S.* v. *Manton,* 107 Fed. (2d) 834). The evidence was that in the private litigation of *Art Metal Works* v. *Abraham and Straus* (Nos. 1 and 2), the President of the company was one of the conspirators (see 107 Fed. (2d) at 840). In the cases of *Electric Auto-Lite Co.* v. *P. & D. Manufacturing Co.,* and *General Motors Corp.* v. *Preferred Electric and Wire Corp.,* it was shown that the litigants'

patent attorney, John L. Lotsch, was one of the conspirators (107 Fed. (2d) 841).

Nevertheless, the Second Circuit did not punish the litigants and directed no such drastic steps as an outright dismissal of the complaints in the civil actions. In the *Art Metal Works* case, reargument was ordered and had (107 Fed. (2d) 940 and 944). In the *Electric Auto-Lite Co.* and *General Motors Corp.* cases, the litigants were permitted to consent to a reargument and such a reargument was had on the merits (109 Fed. (2d) 566 and 615).

Compare what has happened to your petitioner as a private litigant in the Third Circuit. Although twice tried, neither Judge Davis nor the lawyer Kaufman were ever convicted (Record, p. 2784). Judge Manton and his conspirators were. In its opinion in the *American* case, the court below has failed to find any conspiracy so far as American and the court are concerned.

All that Singer asked for was a reargument. The court itself suggested that American could avoid the expense of the trial by consenting to such a reargument (March 23, 1948, Hearing, pp. 54, 55, 126, 139 through 144), and then when American did offer to reargue (see Minutes, p. 2526), the court itself refused the offer (Minutes, p. 1159).

The court below has graphically described its opposition at a hearing affecting costs as follows:

> "It may also be noted as indicating the character or attitude of Singer in the beginning, that at

first its application was confined to a petition for a recall of the mandate and a reargument of the case.

"It was upon the insistence of the Court that the matter was not confined merely to reargument, and Singer has gained far more through the insistence of this Court on that point than it originally sought" (Minutes of October 25, 1948, Hearing, p. 25).

And yet upon the completion of the whole investigation, the court below could not find that American's judgment against Singer had been procured by improper influence exerted upon any member of the court. Nevertheless and contrary to all available precedent, the Third Circuit instead of setting aside the mandate and ordering a reargument, has dismissed American's complaint.

Petitioner submits as a first additional ground for the allowance of this writ the following proposition:

(1) The court below deviated from proper procedure established by precedent and erred as a matter of law when it dismissed American's complaint instead of directing a reargument of the appeal.

Why should Singer, as the court below itself has said, gain "far more through the insistence of this Court * * * than it originally sought?"

II.

This Court's attention has not heretofore been called to the important fact that when the complexity and expense of the proposed trial became apparent in pretrial conference in these proceedings, your petitioner offered to consent to the relief requested by Singer and reargue the appeal (as had been permitted by the Second Circuit in the private litigations to which reference was made above).

Petitioner does not question the power of the court below, particularly in view of the unsatisfactory result that both criminal trials against Judge Davis and Kaufman had resulted in a hung jury, to insist on going forward with a complete investigation in which counsel for all of the parties, as officers of the court, were required to assist. But under the circumstances in American's case as distinguished from that in Universal, the petitioner here submits as a second substantial question not previously raised the following:

(2) After the court below had refused American's offer to consent to reargument, had insisted upon a complete investigation and had failed to find in American's case that anyone of the judges had been improperly influenced, it was an abuse of the court's discretion to have dismissed American's complaint rather than setting aside the mandate and directing a reargument of the appeal on its merits.

III.

As noted above, the investigation proceeded at the insistence of the court, which desired to get at all of the facts and to determine once and for all whether the conspiracy existed between Davis and Kaufman to obstruct justice in the Third Circuit.

As clearly appears in the opinion of the court below, the witness, Murray Becker, who is a practicing attorney in New York City, was alleged to have had a most important part in the alleged conspiracy (see Op., pp. 33, 48, 49, 53 and n. 8, p. 53). Becker was not called in either of the criminal cases against Davis and Kaufman, in the grand jury investigations, in the disciplinary proceedings both State and Federal nor before Special Master White (Minutes, p. 3288).

But here, before the Third Circuit, the United States, as *amicus* promised to produce his testimony, at least in deposition form, and American had every right to rely on this promise. (See Notice of Time and Place of Taking of Depositions served on the parties March 25, 1948 and the order authorizing the taking of such depositions filed March 27, 1948 herein.) However, no deposition was taken and no notice or explanation was ever given to American or to the Court by *amicus* for failing to do so. Finally on the trial itself, Becker was not produced and no explanation was given therefor (Op., p. 53, n. 8).

Nevertheless, as the opinion of the court below in American's case shows, it is based on a detailed description of Becker's alleged knowledge of the relations between Judge Davis and Kaufman and an assumption by the court, in the face of the uncontradicted and categorical denials made before it by the

officers of American, that American learned of these improper relations from Becker.

It is inconceivable that in any complete investigation, such as that upon which the court apparently insisted, the court should have permitted the nonproduction of Becker by *amicus* without public explanation. Certainly the invesigation was incomplete without Becker's appearance or testimony. It left the court, as its opinion shows, the problem of guessing at the truth based upon inferences of what Becker knew and what American knew Becker knew about the relationship between Kaufman and Davis.

We assume in this application for rehearing that the court below had the power to make inferences from the evidence but petitioner earnestly submits as a third additional substantial ground for the granting of the writ the following:

> **(3) In view of the incompleteness of the investigation resulting from the court's failure to require the production of a most material witness and the court's insistence on basing its findings in American's case on inference and suspicion, it was error and an abuse of discretion by the court below to dismiss the complaint rather than to set aside the mandate and direct a reargument.**

This is the first time, so far as counsel has been able to find, that in the absence of any finding that improper influence had been employed on the court, the corporate litigant's complaint had been dismissed merely upon the assumption that the corporate officer had hired a lawyer whom he assumed was personally

intimate and had influence with a member of the court. Previously, no such penalty had been imposed on a corporate litigant even where it had been proved in a criminal trial that improper influence had been employed on a member of the court (*Art Metal Works v. Abraham and Straus, supra*, p. 3).

In this case there being no proof or finding that an improper influence by Kaufman had been brought to bear upon Judge Davis, or that the judgment had been affected thereby, the penal nature of the decision by the court below was unwarranted.

Petitioner therefore submits the following as an additional substantial ground for the granting of the writ:

(4) In the absence of a finding by the court below that any improper influence by Kaufman had been brought to bear upon Judge Davis in American's case, or that the judgment had been affected thereby, it was error for the court below, upon the assumption that the lawyer was employed for an ulterior purpose, to dismiss American's complaint rather than to direct a reargument.

The patent litigation instituted by American many years ago ought to be decided upon the merits of that litigation. To dismiss the entire proceeding because of the unfortunate employment of a lawyer later discovered to have been involved in a fraudulent relationship with one of the judges of the court, was unnecessary, extraordinarily punitive and not required

either to uphold the integrity of the court or to do justice between Singer and American.

The petitioner therefore respectfully prays that for the reasons set forth herein this Court grant this petition for rehearing and issue its writ of certiorari for the purpose of reviewing the action in this case by the Court of Appeals for the Third Circuit.

January 29, 1949.

Respectfully submitted,

AMERICAN SAFETY TABLE COMPANY,
Petitioner.

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Certificate of Counsel.

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

EDWIN M. OTTERBOURG.